A **PATHMANABHAN NALLIANNEN v. PP & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEALS NO: B-05-154-06-2013, B-05-155-06-2013, B-05-156-06-2013 & B-05-157-06-2013]
4 DECEMBER 2015

C ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Common intention – Whether established – Whether trial judge had correctly called for defence – Whether combination of direct and circumstantial evidence established guilt of accused persons – Whether inferences from fact and circumstances led to conclusion that appellants were perpetrators of murders*

D ***EVIDENCE:*** *Exhibit – Admissibility – Previous inconsistent statement – Whether evidence of prior conviction admissible in separate criminal proceedings – Whether statement admissible under s. 35 of Evidence Act 1950 – Whether regarded as judicial records – Whether availability of witnesses negated admissibility of exhibits – Whether exhibits correctly admitted – Evidence Act 1950, ss. 11(b), 17, 33 & 74*

E ***EVIDENCE:*** *Information leading to facts discovered – Information leading to discovery – Whether discovery was a consequence of information given by accused persons – Whether police had prior knowledge of locations where discoveries were made – Whether discoveries would not have been made if not for information by accused persons – Whether joint statement by one or more accused persons ought to be excluded – Evidence Act 1950, s. 27*

F ***EVIDENCE:*** *Credibility – Assessment of – Witness under witness protection programme – Whether reason to reject evidence – Whether evidence of witness supported in material particulars by other direct and circumstantial evidence*

G The first to the fourth appellants were convicted and sentenced to death by the High Court on four counts of murder, an offence under s. 302 of the Penal Code read together with s. 34 of the same. The charges were related to the murder of Kamaruddin, Noorhisham, Sosilawati Lawiya and Ahmad Kamil. The appellants were said to have committed the offence on 30 August 2010 at Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, Selangor.
H The prosecution's case was that on 30 August 2010, Sosilawati had told her daughter, SP15, that she was going to Banting to meet a lawyer, Pathma ('the first appellant'), and left her office with her driver, Kamaruddin ('Kamal') and was also accompanied by a banker, Noorhisham ('Hisham') and a lawyer, Ahmad Kamil ('Kamil'). Throughout the journey to Banting,
I there were various telephone conversations between Sosilawati and company with their family and friends, alluding to the fact that they were going to Banting. After the final calls from Sosilawati to SP15 and Hisham and Kamil

to their wives, Sosilawati and company could no longer be contacted. Following reports lodged by the respective family members, the police mounted an investigation and zeroed in on Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, which is a farm belonging to the first appellant ('the farm'). SP33, an Indonesian maid of the first appellant working on the farm testified that at about 7pm on 30 August 2010, she saw one woman and three men at the farm and that she later heard a woman scream and she also saw a big fire, the height of the adjoining palm oil trees. SP33 further testified that she had seen logs being off loaded from a lorry a day earlier by the third appellant and other workers and she had also observed the first and the fourth appellants making preparations indicating the arrival of guests. Apart from witnesses who testified orally as to the journey of Sosilawati and company to Banting and that they were seen on the farm, the prosecution led evidence of telecommunication ('TELCO') printouts and the Call Detail Records ('CDRs') through witnesses from Celcom, Digi and Maxis. Inspector Govindan Narayasamy ('SP32') testified that the information given by the second to the fourth appellants and one Suresh ('SP29') led to the discovery of exhibits which had the DNA of Hisham, Kamal and Kamil. Two very important witnesses for the prosecution were SP29 and Sarawanan ('SP59') who were arrested together with the second and the fourth appellants. SP29 and SP59, who were charged in the Magistrate's Court for disposing evidence related to the murder trial, pleaded guilty to the charge and admitted to the facts tendered by the prosecution which contained statements that Sosilawati and company had been burnt to death at the farm and their ashes had been disposed of. Nevertheless, before the trial judge, SP29 and SP59 stated that nothing untoward happened at the farm on 30 August 2010. They alleged that they were coerced into pleading guilty and admitting to the facts of the case in the Magistrate's Court. On the prosecution's application, two separate trials-within-trial were conducted by the trial judge who subsequently ruled that SP29's credibility was impeached and SP59 was a hostile witness, rendering the evidence of both SP29 and SP59 worthless. The trial judge invoked ss. 11 and 35 of the Evidence Act 1950 ('the EA') and allowed the application of the prosecution to adduce the records of proceedings in the Magistrate's Court under ss. 11 and 73 of the EA. The record of proceedings containing the guilty plea of SP29 and SP59 were marked exhs. P711 and P712 respectively. The trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants' appeal against the convictions and sentences were directed against the findings of the trial judge at the end of the prosecution's case where it was submitted that the prosecution had failed to make out a *prima facie* case against the appellants; that the prosecution led no evidence, direct or circumstantial, that the four alleged victims named in the charges were dead or have been murdered, and if so, how, when, where, why and by whom. The issues for the court's determination were pertaining to:

A B C D E F G H I

(i) exhs. P711 and P712; (ii) information leading to discovery under s. 27 of the EA; (iii) the TELCO/CDR records; (iv) the DNA/forensic evidence; (v) the credibility of SP33; (vi) common intention; (vii) other ancillary issues; and (viii) evaluation of the defence.

Held (dismissing appeals; affirming convictions and sentences of appellants)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Exhibits P711 and P712 were previous inconsistent statements of SP29 and SP59. The evidence of a prior conviction would not have been admissible in separate criminal proceedings to establish the truth of the underlying allegation as it was *res inter alios acta* (not the concern of others). The parties to the murder trial were different and did not, in any manner or form, participate in the earlier proceedings in the Magistrate's Court. The proper place to challenge the credibility of SP29 and SP59 *vis-a-vis* the exhs. P711 and P712 was to put the exhibits to SP29 and SP59 which the prosecution had failed to do. (paras 82-85)

(2) Although the prosecution had relied on ss. 11(b), 17 and 74 of the EA as the basis for admission of P711 and P712, the trial judge had ruled that the proceedings from the Magistrate's Court were admissible under s. 35 of the EA. Section 35 of the EA governs the admissibility of the non-judicial public documents whereas the records from the Magistrate's Court were judicial records which fell under s. 33. Section 33 would have been applicable but for the fact that SP29 and SP59 were available and had testified in the trial. Hence, P711 and P712 were wrongly admitted into the trial and therefore could not form the basis of conviction and neither could they be of any corroborative value. (paras 86, 88 & 89)

(3) There were material contradictions between the evidence of SP32 and his police report. The evidence of SP32 also revealed different versions as regards to who gave the information leading to the discovery of the incriminating items. For s. 27 to apply, the discovery of a fact must be the consequence of the information given by the accused person. In the instant appeal, the police had no prior knowledge of the locations where the items which had the DNA of Kamal, Kamil and Hisham and where the cars belonging to the victims, were found. The items would not have been found if not for the information given by the second to the fourth appellants and Suresh. (paras 105, 106 & 118)

(4) Under s. 27, only the first information or statement that is admissible, and not subsequent information or statement. The evidence of SP32 clearly showed that the information given by Suresh and the second to fourth appellants, leading to the discoveries, were made jointly.

Section 27 does not contemplate joint statement by one or more accused persons and therefore the information or statement given by SP32 ought to have been excluded by the trial judge. Nevertheless, the acts of the second to fourth appellants, in taking SP32 and pointing to the places where the items were recovered, amounted to conduct which was admissible under s. 8 of the EA. Hence, SP32's evidence, insofar as it related to the fact that the second to fourth appellants had displayed conduct consistent with their knowledge of the places where the items which were connected to the commission of the offence and which belonged to the victims were disposed of, was accepted by the court. (paras 119 & 121-123)

(5) Each of the TELCO records from Celcom, Digi and Maxis was correctly admitted notwithstanding some minor discrepancies. There was no reason to reject the evidence of the CDRs as being not creditworthy in absence of the evidence that the appellants had successfully discredited the information from the TELCO companies. Viewed together with the oral evidence of the family members of Sosilawati and company as to their intention to go to Banting and in the light of the evidence of SP15 and SP33, the evidence from the CDRs was accepted as being corroborative of the fact that Sosilawati and company had indeed gone to Banting. (para 134)

(6) There was no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and/or the medical officers were vitiated. The court was satisfied, from the evidence of SP33 and from the presence of the DNA of Hisham, Kamal and Kamil, that all three of them had been burnt on the farm. The photographs showed the combustion site and traces of burning on the farm. The lack of hydrocarbon did not detract from the fact that SP33 had seen a big fire on the night of 30 August 2010. (paras 146, 153 & 154)

(7) The principle in respect of credibility of witnesses is trite that it is within the domain of a trial judge and unless there are compelling reasons for an appellate intervention, an appellate court would defer to the findings of the trial judge who had the audio-visual advantage in assessing the witness. There was no reason to disturb the findings of the trial judge, who had given reasons why he had chosen to believe SP33 over SP89 and SD26. The fact that SP33 was under the witness protection programme was not a reason to reject her evidence, which was supported in material particulars by the CDRs, the DNA evidence and the evidence of the fourth appellant. (paras 161 & 162)

(8) Common intention may be inferred from the facts and surrounding circumstances of the case. There was no evidence of discussion between the appellants. The evidence as regards the participation of all the appellants was from SP33 who testified as to the presence of the

appellants on the farm at the material time and from the conduct of the second to fourth appellants. It is a clear principle of law that for the participation requirement, even a passive role in the commission of the act is enough. (paras 165 & 167)

(9) The proceedings against SP29 and SP59 in the Magistrate's Court had gone through the judicial process and therefore, there was no proof of any complicity as suspected by the defence and there was also no impropriety in the proceedings. The application to call the prosecutors as witnesses was not relevant. While it is a procedural requirement for the prosecution to tender an opening statement as stipulated under s. 179(1) of the Criminal Procedure Code, the departure from it did not adversely affect the prosecution's case. Furthermore, the complaint of the fourth appellant that the trial judge had given his new counsel less than ten days to prepare for the trial, was also devoid of any merits and the trial judge's directive that the fourth appellant be isolated from the rest had not prejudiced him in putting up his defence. (paras 172-174)

(10) At the end of the prosecution case, the trial judge had correctly called for the defence. From the direct evidence of family members, friends and SP33, taken together with the circumstantial evidence in the form of the CDRs, the forensic and the DNA evidence which established the presence of Sosilawati and company at the farm, it could be safely inferred that Sosilawati and company had met their deaths at the farm. The knowledge that the second, third and fourth appellants had of the places where the incriminating items were found and their conduct in showing those places to the police is a definite pointer towards the guilt of the appellants. Hence, the inferences to be drawn from the fact and circumstances of the case unerringly led to the conclusion that within all human probability, Sosilawati was dead and that the appellants were the perpetrators leading to her death as well as the death of Kamal, Hisham and Kamil. The convictions of the appellants were thus safe. (paras 185 & 188-189)

Bahasa Malaysia *Headnotes*

Perayu pertama hingga keempat disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas empat pertuduhan membunuh, satu kesalahan di bawah s. 302 Kanun Keseksaan dibaca bersekali dengan s. 34 Kanun yang sama. Pertuduhan-pertuduhan tersebut melibatkan pembunuhan Kamaruddin, Noorhisham, Sosilawati Lawiya dan Ahmad Kamil. Perayu-perayu dikatakan melakukan kesalahan tersebut pada 30 Ogos 2010 di Lot No, 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, Selangor. Kes pendakwaan adalah bahawa pada 30 Ogos 2010, Sosilawati telah memberitahu anak perempuannya, SP15 bahawa dia akan ke Banting untuk bertemu dengan peguam, Pathma ('perayu pertama'), dan telah meninggalkan pejabat dengan pemandunya, Kamaruddin ('Kamal') dan juga diiringi

jurubank, Noorhisham ('Hisham') dan peguam, Ahmad Kamil ('Kamil'). Sepanjang perjalanan ke Banting, terdapat beberapa perbualan telefon antara Sosilawati dengan rakan-rakannya dan keluarga serta rakan-rakan, menyentuh fakta bahawa mereka sedang ke Banting. Selepas panggilan akhir daripada Sosilawati kepada SP15 dan Hisham dan Kamil kepada isteri mereka, Sosilawati dan rakan-rakannya tidak boleh dihubungi lagi. Berikutan laporan-laporan yang dibuat oleh ahli-ahli keluarga masing-masing, pihak polis memulakan siasatan dan ia membawa ke Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, sebuah ladang milik perayu pertama ('ladang tersebut'). SP33, seorang pembantu rumah perayu pertama dari Indonesia yang bekerja di ladang tersebut memberikan keterangan bahawa pada kira-kira 7 petang pada 30 Ogos 2010, dia nampak seorang wanita dan tiga lelaki di ladang tersebut dan kemudian terdengar jeritan seorang wanita dan juga nampak api yang marak, pada ketinggian pokok-pokok kelapa sawit bersebelahan. SP33 selanjutnya memberikan keterangan bahawa dia melihat kayu-kayu diturunkan dari sebuah lori sehari sebelumnya oleh perayu ketiga dan pekerja-pekerja lain dan dia juga melihat perayu pertama dan keempat membuat persediaan yang menunjukkan ketibaan tetamu. Selain saksi-saksi yang memberi keterangan lisan tentang perjalanan Sosilawati dan rakan-rakannya ke Banting dan bahawa mereka dilihat di ladang tersebut, pihak pendakwaan mengemukakan keterangan cetakan telekomunikasi ('TELCO') dan Rekod Butiran Panggilan ('CDR') melalui saksi-saksi dari Celcom, Digi dan Maxis. Inspektor Govindan Narayasamy ('SP32') memberi keterangan bahawa maklumat yang diberikan oleh perayu kedua hingga keempat dan seorang bernama Suresh ('SP29') menjurus kepada penemuan ekshibit-ekshibit yang mengandungi DNA Hisham, Kamal dan Kamil. Dua orang saksi penting pihak pendakwaan adalah SP29 dan Sarawanan ('SP59') yang ditangkap bersama-sama dengan perayu kedua dan keempat. SP29 dan SP59, yang dipertuduh di Mahkamah Majistret atas kesalahan melupuskan bukti berkaitan perbicaraan pembunuhan tersebut, mengaku bersalah terhadap pertuduhan tersebut dan mengakui fakta yang dikemukakan oleh pihak pendakwaan yang mengandungi kenyataan bahawa Sosilawati dan rakan-rakannya dibakar sehingga mati di ladang tersebut dan abu mayat mereka telah dilupuskan. Walau bagaimanapun, di hadapan hakim bicara, SP29 dan SP59 menyatakan bahawa tiada kejadian yang tidak diduga berlaku di ladang tersebut pada 30 Ogos 2010. Mereka mendakwa bahawa mereka dipaksa mengaku bersalah dan mengakui fakta-fakta kes di Mahkamah Majistret. Atas permohonan pihak pendakwaan, dua perbicaraan-dalam-perbicaraan dibuat oleh hakim bicara yang kemudian memutuskan bahawa kredibiliti SP29 dicabar dan SP59 adalah saksi belot, menjadikan keterangan SP29 dan SP59 tidak bernilai. Hakim bicara membangkitkan ss. 11 dan 35 Akta Keterangan 1950 ('Akta') dan membenarkan permohonan pihak pendakwaan untuk mengemukakan rekod prosiding Mahkamah Majistret di bawah s. 11 dan 73 Akta. Rekod prosiding yang mengandungi pengakuan bersalah SP29 dan SP59 ditandakan sebagai eks. P711 dan P712. Hakim bicara mendapati keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan cukup

untuk membuktikan kesnya melampaui keraguan munasabah. Rayuan perayu-perayu terhadap sabitan dan hukuman diarahkan terhadap dapatan hakim bicara di akhir kes pendakwaan di mana dihujahkan bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* terhadap perayu-perayu; bahawa pihak pendakwaan tidak mengemukakan keterangan, langsung atau ikut keadaan, bahawa keempat-empat mangsa yang dinamakan dalam pertuduhan telah mati atau telah dibunuh, dan jika demikian, bagaimana, bila, di mana, mengapa dan oleh siapa. Isu-isu bagi pertimbangan mahkamah adalah berkaitan: (i) eks. P711 dan P712; (ii) maklumat yang membawa kepada penemuan di bawah s. 27 Akta; (iii) rekod TELCO/CDR; (iv) keterangan DNA/forensik; (v) kredibiliti SP33; (vi) niat bersama; (vii) isu-isu sampingan dan (viii) penilaian pembelaan.

Diputuskan (menolak rayuan-rayuan; mengesahkan sabitan-sabitan dan hukuman-hukuman terhadap perayu-perayu)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Ekshibit P711 dan P712 adalah kenyataan terdahulu oleh SP29 dan SP59 yang tidak selari. Keterangan sabitan terdahulu tidak boleh diterima dalam prosiding jenayah berasingan untuk membuktikan kebenaran dalam dakwaan kerana ia *res inter alios acta* (tidak melibatkan yang lain). Pihak-pihak dalam perbicaraan pembunuhan adalah berbeza dan tidak, dalam apa-apa cara dan bentuk, terlibat dalam prosiding terdahulu di Mahkamah Majistret. Cara wajar untuk mencabar kredibiliti SP29 dan SP59 *vis-a-vis* eks. P711 dan P712 adalah dengan mengemukakan eksibit-eksibit tersebut kepada SP29 dan SP59 yang mana pihak pendakwaan gagal berbuat demikian.

(2) Walaupun pihak pendakwaan bersandar pada ss. 11(b), 17 dan 74 Akta atas dasar pengakuan terhadap P711 dan P712, hakim bicara memutuskan bahawa prosiding Mahkamah Majistret tidak boleh diterima di bawah s. 35 Akta. Seksyen 35 Akta mentadbir kebolehterimaan dokumen-dokumen awam yang bukan kehakiman sementara rekod Mahkamah Majistret adalah rekod kehakiman yang terangkum di bawah s. 33. Seksyen 33 terpakai jika bukan kerana SP29 dan SP59 yang sedia ada dan telah memberikan keterangan semasa perbicaraan. Oleh itu, P711 dan P712 diterima masuk secara salah dalam perbicaraan dan oleh itu, tidak boleh membentuk asas sabitan dan juga tidak boleh mempunyai apa-apa nilai sokongan.

(3) Terdapat percanggahan material antara keterangan SP32 dan laporan polisnya. Keterangan SP32 mendedahkan versi berbeza berkaitan siapa yang memberi maklumat yang menjurus terhadap penemuan item-item yang menunjukkan kebersalahan. Untuk s. 27 Akta terpakai, penemuan fakta mesti daripada maklumat yang diberikan oleh tertuduh. Dalam rayuan ini, pihak polis tidak mempunyai pengetahuan awal mengenai lokasi di mana item-item yang

mengandungi DNA Kamal, Kamil dan Hisham dan di mana kereta-kereta mangsa ditemui. Item-item tersebut tidak mungkin dijumpai jika bukan kerana maklumat yang diberikan oleh perayu kedua hingga keempat dan Suresh.

(4) Di bawah s. 27, hanya maklumat atau kenyataan pertama yang boleh diterima, dan bukan maklumat atau kenyataan terkemudian. Keterangan SP32 jelas menunjukkan bahawa maklumat oleh Suresh dan perayu-perayu kedua hingga keempat, menjurus terhadap penemuan, dibuat secara bersekali. Seksyen 27 tidak membayangkan kenyataan bersama oleh seorang atau lebih daripada seorang tertuduh dan oleh itu, maklumat atau kenyataan yang diberikan oleh SP32 wajar diketepikan oleh hakim bicara. Walau bagaimanapun, tindakan perayu kedua hingga keempat, dalam membawa SP32 dan menunjukkan tempat di mana item-item tersebut dijumpai, membentuk perbuatan yang boleh diterima di bawah s. 8 Akta. Oleh itu, keterangan SP32, setakat yang berkaitan dengan fakta bahawa perayu kedua hingga keempat menunjukkan perbuatan yang selari dengan pengetahuan mereka tentang tempat di mana item-item yang berkaitan dengan kesalahan dan milik mangsa-mangsa dilupuskan, diterima oleh mahkamah.

(5) Semua rekod TELCO Celcom, Digi dan Maxis diterima masuk dengan betul walaupun terdapat percanggahan kecil. Tiada alasan untuk menolak keterangan CDR sebagai tidak boleh dipercayai tanpa keterangan perayu-perayu yang berjaya mencabar maklumat syarikat-syarikat TELCO tersebut. Dipertimbangkan bersekali dengan keterangan lisan ahli keluarga Sosilawati dan rakan-rakannya mengenai niat untuk ke Banting dan berdasarkan keterangan SP15 dan SP33, keterangan daripada CDR diterima sebagai menyokong fakta bahawa Sosilawati dan rakan-rakannya sememangnya telah ke Banting.

(6) Tiada keterangan bahawa integriti ekshibit-ekshibit terjejas sehingga hasil analisis ahli kimia dan pegawai perubatan terbatal. Mahkamah berpuas hati, berdasarkan keterangan SP33 dan kewujudan DNA Hisham, Kamal dan Kamil, bahawa ketiga-tiga mereka dibakar di ladang tersebut. Gambar-gambar menunjukkan kawasan pembakaran dan kesan kebakaran di ladang tersebut. Ketiadaan hidrokarbon tidak menjejaskan fakta bahawa SP33 melihat kebakaran besar pada malam 30 Ogos 2010.

(7) Prinsip berkaitan kredibiliti saksi adalah matan dan dalam rangkuman hakim bicara dan kecuali terdapat alasan yang kukuh untuk campur tangan rayuan, mahkamah rayuan tidak akan mengubah dapatan hakim bicara yang mempunyai kelebihan pandang dengar dalam menilai saksi. Tiada alasan untuk mengganggu dapatan hakim bicara,

yang telah memberikan alasan mengapa beliau telah memilih untuk mempercayai SP33 mengatasi SP89 dan SD26. Fakta bahawa SP33 berada dalam program perlindungan saksi bukan alasan untuk menolak keterangannya, yang disokong oleh butiran daripada CDR, keterangan DNA dan keterangan perayu keempat.

(8) Niat bersama boleh disimpulkan berdasarkan pada fakta dan keadaan sekeliling kes. Tiada keterangan perbincangan antara perayu-perayu. Keterangan berkaitan penglibatan kesemua perayu adalah daripada SP33 yang memberi keterangan mengenai kehadiran perayu-perayu di ladang tersebut pada masa itu dan daripada tindakan perayu kedua hingga keempat. Prinsip undang-undang jelas bahawa keperluan penglibatan, walaupun peranan pasif dalam melakukan kesalahan adalah mencukupi.

(9) Prosiding-prosiding terhadap SP29 dan SP59 di Mahkamah Majistret telah melalui proses penghakiman dan oleh itu, tiada bukti subahat seperti yang diragui oleh pihak pembelaan dan juga tiada kesalahan dalam prosiding. Permohonan untuk memanggil pendakwa sebagai saksi tidak relevan. Walaupun prosedur memerlukan pihak pendakwaan mengemukakan ucapan pembukaan seperti yang dinyatakan di bawah s. 179 Kanun Tatacara Jenayah, penyimpangan daripadanya tidak menjejaskan kes pendakwaan. Selanjutnya, aduan perayu keempat bahawa hakim bicara memberikan peguam barunya kurang sepuluh hari untuk bersedia bagi perbicaraan, tidak bermerit dan arahan hakim bicara bahawa perayu keempat diasingkan daripada yang lain tidak memprejudiskan perayu keempat daripada mengemukakan pembelaannya.

(10) Di akhir kes pendakwaan, hakim bicara telah memanggil pembelaan dengan sewajarnya. Berdasarkan keterangan langsung ahli keluarga, rakan-rakan dan SP33, dipertimbangkan bersama-sama dengan keterangan ikut keadaan dalam bentuk CDR, keterangan forensik dan DNA yang membuktikan kehadiran Sosilawati dan rakan-rakannya di ladang tersebut, adalah selamat untuk membuat kesimpulan Sosilawati dan rakan-rakannya menemui ajal mereka di ladang tersebut. Pengetahuan perayu kedua, ketiga dan keempat mengenai tempat barangan salah ditemui dan tindakan mereka menunjukkan tempat tersebut kepada pihak polis merupakan petunjuk jelas yang membuktian kebersalahan perayu-perayu. Oleh itu, kesimpulan yang boleh dibuat daripada fakta dan keadaan kes Sosilawati adalah bahawa dia telah meninggal dunia dan perayu-perayu adalah pelaku yang menyebabkan kematiannya dan juga kematian Kamal, Hisham dan Kamil. Oleh itu, sabitan perayu-perayu selamat.

Case(s) referred to:

Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Bala Matik v. PP [2006] 2 CLJ 229 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(foll)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors [1999] 7 CLJ 558 HC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Harun Abdullah v. PP [2009] 4 CLJ 717 CA ***(refd)***
Hollington v. F Hewthorn & Co Ltd [1943] 1 KB 587 ***(foll)***
Illian & Anor v. PP [1988] 1 LNS 139 SC ***(refd)***
Krishna Rao Gurumurthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lim Pah Soon v. PP [2013] 8 CLJ 800 CA ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
MP State Dhannalal Moruji [1961] 2 Cr LJ 238 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Mustapha Awang Besar lwn. PP [2015] 1 LNS 52 CA ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Ong Chee Hoe & Anor v. PP [1999] 4 SLR 688 ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Leong Heo Cheong [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738 HC ***(refd)***
PP v. Liew Sam Seong [1981] 1 LNS 159 ***(refd)***
PP v. Lim Teik Seng & Ors [1985] 2 CLJ 61; [1985] CLJ (Rep) 691 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1993] 1 LNS 95 HC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
Prakash Chand v. State 1979 AIR SC 400 ***(refd)***
Ragg v. Magistrates' Court of Victoria and Corcoris [2008] 2 VSC 1 ***(refd)***
Ramkishan Mithalal Sharma v. State of Bombay 1955 AIR 104 SC ***(refd)***
Sharad Birdhichand Sarda v. State of Maharashtra [1984] 4 SCC 116 ***(foll)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Syamo Malia Patro v. Emperor AIR 1932 Mad 391 ***(refd)***
Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***
Vasan Singh v. PP [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166 SC ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***
Wan Marzuki Wan Abdullah v. PP [2008] 4 CLJ 631 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 112, 179(1), 402A
Evidence Act 1950, ss. 3, 8, 11(b), 17, 24, 27, 34, 35, 40, 41, 42, 43, 44, 73, 74, 90A, 103, 145
Penal Code, ss. 34, 302

(Criminal Appeal No: B-05-154-06-2013)
For the appellant - Manjeet Singh Dhillon; M/s Manjeet Singh Dhillon
For the respondent - Ishak Mohd Yusoff (Saiful Edris Zainuddin, Idham Abd Ghani, Norinna Bahadun & Jasmee Hameeza Jaafar with him); DPP

(Criminal Appeal No: B-05-155-06-2013)
For the appellant - Gurbachan Singh (Hisham Teh Poh Teik with him); M/s Bachan & Kartar.
For the respondent - Ishak Mohd Yusoff (Saiful Edris Zainuddin, Idham Abd Ghani, Norinna Bahadun & Jasmee Hameeza Jaafar with him); DPP

(Criminal Appeal No: B-05-156-06-2013)
For the appellant - Amer Hamzah Arshad (Khaizan Sharizad Ab Razak with him); M/s Amer Hamzah & Sharizad
For the respondent - Ishak Mohd Yusoff (Saiful Edris Zainuddin, Idham Abd Ghani, Norinna Bahadun & Jasmee Hameeza Jaafar with him); DPP

(Criminal Appeal No: B-05-157-06-2013)
For the appellant - Stanislaus Vethanayagam; M/s MS Vethanayagam & Assocs
For the respondent - Ishak Mohd Yusoff (Saiful Edris Zainuddin, Idham Abd Ghani, Norinna Bahadun & Jasmee Hameeza Jaafar with him); DPP

[Editor's note: For the High Court judgment, please PP v. Pathmanabhan Nalliannen & Ors [2013] 5 CLJ 1025 (affirmed).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Background Facts

[1] The first to the fourth appellants (the first to the fourth accused in the court below) were convicted and sentenced to death by the High Court at Shah Alam on four counts of murder, an offence under s. 302 of the Penal Code read together with s. 34 of the same Code. The first to the fourth charges relate to the murder of Kamaruddin bin Shamsuddin; Noorhisham bin Mohamad; Sosilawati binti Lawiya and Ahmad Kamil bin Abdul Karim, respectively. The appellants were said to have committed the offence on 30 August 2010 at Lot No. 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, Selangor.

[2] The murder trial began with the journey of Sosilawati, Kamaruddin, Noorhisham and Ahmad Kamil (Sosilawati and company) to Banting on 30 August 2010. They never came home and their bodies were never found.

Proceedings In The High Court

[3] Briefly, the prosecution case was that on 30 August 2010 Sosilawati had told her daughter, Erni Dekriwati Yuliana bt Buhari (SP15), that she was going to Banting to meet lawyer Pathma (the first appellant). The purpose of the visit as told by Sosilawati to SP15 was to bring forward the payments on

two cheques in the amount of RM3m and RM1m respectively issued by the first appellant. Sosilawati needed money to pay bonuses to her staff and to give her family for the upcoming Hari Raya festival.

[4] Sosilawati left her office at Nouvelles Visages, No. 59, Lorong Haji Hussein 1, Off Jalan Raja Bot, Kuala Lumpur with her driver, Kamaruddin (Kamal) in her BMW car bearing registration number WTL 11.

[5] Sosilawati was accompanied by a banker, Noorhisham (Hisham) and a lawyer, Ahmad Kamil (Kamil). Hisham and Kamil were travelling in another car, a BMW bearing registration number AAJ 5, which belonged to Kamil. Hisham's wife (Suzanna binti Radin Pangat, SP8) and Kamil's wife (Sabrina binti Adnan, SP14) had testified to the fact that their husbands were accompanying Sosilawati to Banting.

[6] Throughout the journey to Banting, there were various telephone conversations between Sosilawati and company with their family and friends, alluding to the fact that they were going to Banting.

[7] Kamal's nephew, Khairul Izwan bin Ismail (SP9) spoke to Kamal at about 5pm on 30 August 2010 about his intention to sleep over at the latter's house. Kamal had told SP9 that he was in Banting with Sosilawati.

[8] Lyly Zanariah binti Abdul Manaf (SP62), a bank officer at CIMB Kampung Baru Branch said that Hisham had informed her in the morning of 30 August 2010 that he would be in Banting in the evening of 30 August 2010 to break fast with a lawyer.

[9] At about 5.20pm, Zurayina binti Jemaat (SP7), a salesgirl at Fazz Enterprise Banting, saw Sosilawati and a person called "Kamal" at her shop. Sosilawati had bought kerepek and cakes worth RM200.

[10] At about 7pm on 30 August 2010, Kamil called SP15. In the telephone conversation between Kamil and SP15, Kamil had said "entah mak engkau bawa pergi hutan mana ni pokok kelapa sawit ni". Kamil had also informed SP15 that Sosilawati was in another car in front of them.

[11] At about 8.30pm, SP15 received an unusual call from Sosilawati. Sosilawati had informed SP15 that Kamal had taken photographs of her in compromising positions *via* hidden cameras placed in her bathroom in her house. Sosilawati's friend, Habishah binti Bahari (SP16) received a similar call about Kamal. That was the final call that SP15 and SP16 received from Sosilawati. Upon checking Sosilawati's bathroom, SP15 found nothing incriminating.

[12] Hisham and Kamil had similarly made final calls to their wives informing them that they would not be returning home for the next three days and that they would be going to Genting Highlands. The reason was related to the problem faced by Sosilawati and her driver. After the final calls, Sosilawati and company could no longer be contacted.

[13] On 31 August 2010, Sosilawati's ex-husband, Buhari bin Mohamed (SP24) and her daughter went to Banting to locate Sosilawati but they failed. SP24 had called the first appellant who denied having met Sosilawati on 30 August 2010.

[14] Following reports lodged by the respective family members, the police mounted an investigation and zeroed in on Lot 2001, Jalan Tanjung Layang, Tanjung Sepat, Banting, a farm belonging to the first appellant (the farm).

[15] Siti Hamidah Karnax (SP33), an Indonesian maid of the first appellant working on the farm testified that at about 7pm on 30 August 2010, she saw one woman and three men at the farm and that she later heard a woman screamed and she also saw a big fire, the height of the adjoining palm oil trees. SP33 further testified that she had seen logs being off loaded from a lorry a day earlier by the third appellant and other workers and she had also observed the first and the fourth appellants making preparations indicating the arrival of guests.

[16] Apart from witnesses who testified orally as to the journey of Sosilawati and company to Banting and that they were seen on the farm, the prosecution led evidence of telecommunication (TELCO) printouts and the Call Detail Records (CDRs) through witnesses from Celcom, Digi and Maxis.

[17] Inspector Govindan a/l Narayasamy (SP32) testified that the information given by the second to the fourth appellants and one Suresh a/l Ulaganathan (SP29) led to the discovery of among others, a cricket bat, bloodstains on the wall of the premise at the farm, bone pieces, handphones, wristwatches, car keys, burnt woods/logs and zinc sheets.

[18] The chemist, Lim Kong Boon (SP86) stated that the cricket bat had the DNA of Hisham, the bloodstains (Swab 9) found on the wall of the premise at the farm matched that of the immediate family members of Hisham and the zinc sheets had the DNA of Kamal and Kamil. SP86 and Dr. Zaleha binti Abdul Manaf (SP71) could not make any positive findings on the bones as they had been subjected to extreme heat and had lost all traces of DNA. But Dr. Nurliza binti Abdullah (SP63), Dr. Norhayati binti Jaafar (SP69), and SP71 stated that the bones recovered were most probably human bones.

[19] The prosecution attempted to adduce similar facts evidence through Samson Nahar binti Mohamed Dali (SP96) and Usha Rani Sethuraman (SP101) where both SP96 and SP101 had stated that their husbands (Shafiq and Muthuraja respectively) had business and legal dealings with the first appellant and that both are missing to date.

[20] Two very important witnesses for the prosecution were SP29 and Sarawanan a/l Kandasamy (SP59) who were arrested together with the second and the fourth appellants. SP29 and SP59 were charged in the Magistrates

Court at Teluk Datuk for disposing evidence related to this murder trial. SP29 was charged with disposing the ashes of Sosilawati and company whereas SP59 was charged with helping to burn the bodies of Sosilawati and company.

[21] Both SP29 and SP59 had pleaded guilty to the charge and had admitted to the facts tendered by the prosecution which contained statements that Sosilawati and company had been burnt to death at the farm and their ashes had been disposed off.

[22] Nevertheless, before the learned trial judge, SP29 and SP59 stated that nothing untoward happened at the farm on 30 August 2010. They alleged that they were coerced into pleading guilty and admitting to the facts of the case in the Magistrates Court.

[23] Based on the statements recorded by the police under s. 112 of the Criminal Procedure Code (CPC), the prosecution sought to impeach the credibility of SP29 and SP59. Two (2) separate trials-within-trial were conducted by the learned trial judge resulting in His Lordship's ruling that SP29's credibility was impeached and SP59 was a hostile witness, rendering the evidence of both SP29 and SP59 worthless.

[24] The prosecution, amid strong objections from the defence, then applied to adduce the records of proceedings in the Magistrates Court under ss. 11 and 73 of the Evidence Act 1950 (the EA). After hearing arguments, the learned trial judge invoked ss. 11 and 35 of the EA and allowed the application of the prosecution. The record of proceedings containing the guilty plea of SP29 and SP59 were marked exhs. P711 and P712 respectively.

Findings Of The Trial Judge At The End Of The Prosecution Case

[25] On the evidence of the family members whose evidence the learned trial judge found to be credible, His Lordship made a finding of fact that Sosilawati did intend to go to Banting on 30 August 2010 to meet the first appellant in relation to the two cheques issued by the first appellant. From the evidence of SP7 and from the telephone conversations, the learned trial judge found that Sosilawati and company did embark and did in fact reach Banting. In the face of the specific intention of Sosilawati to meet the first appellant in relation to the cheques, the learned trial judge found the unusual calls with regard to Kamal and not returning home for three days were just a ploy to throw the family off-guard and to stop them from immediately searching for Sosilawati and company.

[26] As for the TELCO records, the learned trial judge found that they had accurately charted out the journey of Sosilawati and company and that the last calls made by Sosilawati and company were in the area where the farm is situated and since the farm belongs to the first appellant, it ties to the purpose of Sosilawati's trip to Banting which was to meet the first appellant.

[27] The learned trial judge found SP33 to be a credible and truthful witness and accepted her direct evidence that she had seen three men and one woman on the farm in the evening of 30 August 2010 and that there was a big fire on the farm later that evening.

[28] His Lordship accepted the evidence of SP32 that information had been obtained from the second to the fourth appellants and SP29 which led to the discoveries of handphones, watches, bones, zinc sheets, cricket bat, bloodstains, burnt logs and the two vehicles used by Sosilawati and company to travel to Banting.

[29] In determining whether the information under s. 27 of the EA can be excluded and whether the second and the fourth appellants had suffered oppression to such an extent forcing them to give the information which they might not have otherwise given, the learned trial judge conducted a trial-within-trial. His Lordship concluded that the second and the fourth appellants suffered no such oppression.

[30] It was the finding of the learned trial judge that Sosilawati would not have gone to the farm unannounced. His Lordship made an inference that it was the first appellant who had lured Sosilawati to the farm. From the evidence of SP33, the learned trial judge found that the manner in which Sosilawati and company were burnt to death leans towards a pre-arranged plan orchestrated by the first appellant and carried out by the second to the fourth appellants which bring into action the provision of s. 34 of the Penal Code on common intention.

[31] The probative value of exhs. P711 and 712 was considered by the learned trial judge who accepted the exhibits as corroborative fact that Sosilawati and company had been burnt to death.

[32] The evidence in respect of Shafiq and Muthuraja was rejected by the learned trial judge as being nothing more than a coincidence which did not qualify them to be considered as similar facts evidence.

[33] Having regard to the direct evidence of the witnesses, the telecommunication records and the inferences made from the conduct of the appellants in the discovery of the exhibits as well as the forensic and medical evidence, the learned trial judge found that the prosecution had successfully proven all the ingredients of the charge of murder under s. 302(a) of the Penal Code, to a standard if unexplained by the appellants, can lead to their convictions. The appellants were thus called upon to enter their defence.

The Defence

[34] All the four appellants gave evidence under oath and a total of 26 other witnesses testified for the defence.

[35] The first appellant confirmed that he was the lawyer for Sosilawati and for one Rahman Palil in a land transaction in Penang but denied having met Sosilawati and company at the farm on 30 August 2010. He stated that at about 8.30pm on 30 August 2010, the fourth appellant had driven him to Subang Jaya to meet a friend.

[36] The second and the third appellants stated that they worked at the farm and admitted that they were present at the farm on 30 August 2010. They had stated that although the first appellant was the owner of the farm, their dealings were mostly with the fourth appellant who paid their salary and who directed and supervised their work on the farm. The second and the third appellants further testified that the first appellant did not come to the farm on 30 August 2010 and that nothing untoward happened at the farm on 30 August 2010. According to the second and the third appellants, both of them together with the fourth appellant, SP29 and SP59 had gathered at the farm around midnight on 30 August 2010 to hoist the Malaysian flag and to light a small fire to celebrate Merdeka. Thereafter, they ate and slept until the next morning.

[37] In the morning of 31 August 2010, the second appellant stated that he went to his grandmother's house and returned only in the evening. His grandmother, Angamma a/p Rengamy (SD13) confirmed the visit.

[38] The third appellant stated that on 31 August 2010 he carried out his routine duties at the farm.

[39] The fourth appellant testified that he stayed at the farm and that his role was limited to the construction works at the farm and to supervise the workers involved in the construction works. He stated that the rest of the farmhands including the second and the third appellants were under the direct supervision of the first appellant and that the second appellant was also the bodyguard of the first appellant.

[40] Contrary to the evidence of the first, second and the third appellants, the fourth appellant stated that the first appellant was at the farm on 30 August 2010 and that Sosilawati and company came to the farm on 30 August 2010 to meet the first appellant. According to the fourth appellant, there were about four or five other people besides Sosilawati and company who came to the farm at the same time.

[41] The fourth appellant further stated that he heard a quarrel in one of the premises at the farm and when he went in, he saw Sosilawati's driver being beaten. He also testified to seeing the lawyer (Kamil) being beaten and that he heard the first appellant giving instructions to the second and the third appellants to kill the driver and the lawyer. The fourth appellant had also stated that he saw Sosilawati and company and few others being bundled to the neighbouring farm and the next morning he saw the persons being brought

back to the farm. At the farm, he witnessed the three persons accompanying Sosilawati being burnt on the arrangement of the logs at the location which he had marked on the sketch plan.

[42] It was further the evidence of the fourth appellant that the first appellant had cajoled him to accept what had happened and asked him and the second and the third appellants to remain silent on the matter. The first appellant had also prepared them to face a possible arrest and indicated that they could co-operate with the police as later they could retract any statement to the police by claiming that the statement was given under force.

[43] One aspect of the fourth appellant's testimony was at variance with the prosecution's case, namely the fourth appellant stated that he had seen Sosilawati on 7 September 2010 at Tanjung Sepat.

[44] The father of SP59, Kandasamy a/l Nadeson (SD15) testified that on the arrest of SP59, he had engaged the services of Avtaar Singh a/l Sukhdev Singh (SD9) to defend SP59 in the event SP59 was charged.

[45] SD15 stated that he was however summoned to the Kuala Lumpur police contingent head quarters where he was persuaded to appoint a lawyer whom the police recommended if he wanted to see his son being freed. He was pressurised into signing the warrant to act authorising the recommended lawyer to act for SP59.

[46] SD15 further stated that he was later informed that a team of lawyers had been assigned to defend his son at the proceedings in the Magistrates Court Teluk Datuk. At this point, SD15 said that he had a change of heart and wanted to revert to SD9 but SP59 refused to revert to SD9.

[47] The evidence of SD9 echoed that of SD15 where SD9 testified as to how he was unceremoniously dumped in favour of another team of lawyers and that he only discovered this when he attended the Magistrates Court Teluk Datuk in the morning of the proceedings.

[48] ACP Abdul Aziz bin Zakaria (SD28) admitted that he had recommended his acquaintance, Roslie bin Sulle (SD30) to defend SP29 and SP59 when SD30 came to his office on an unrelated matter.

[49] SD30 confirmed that he acted for SP29 and SP59 with another lawyer by the name of Puravalen and that he did so with the explicit and written agreement of both the accused and their families.

[50] A number of police personnel were called by the defence to show that the oral testimony of SP32 and his team in relation to the information leading to discovery was contrary to the entries in the lock up register and that the movements in and out of the lock up showed that the appellants were kept away for a long period of time.

[51] Pavithra a/p Rama Sundran (SD26), an occupant on the farm confirmed that SP33 was also an occupant, working as a maid. According to SD26, nothing unusual happened at the farm on the night of 30 Augsut 2010. She said she did not hear anything nor did she see any fire outside the house where they stayed. According to SD26, there was no unusual activity on 31 August 2010 as well.

[52] Sivabalan a/l Nagayah (SD20) was a government chemist entrusted with analysing soil samples from the tyres of the vehicles handed to him by the police. He confirmed that he was not requested or directed to carry out comparison studies of the soil samples taken from the tyres of the car with the soil samples taken from the farm.

[53] Balasubramaniam a/l P Chinaswary (SD12), a person who carried out the Hindu cremation ritual testified as to how a cremation took place and the aftermath of the cremation. It was the evidence of SD12 that the logs recovered by the police was not suitable for open burning and that it would be impossible for more than one body stacked on top of another to be burnt effectively.

Findings Of The Trial Judge At The End Of The Defence Case

[54] Having evaluated the evidence adduced by the defence as well as the evidence of the case as a whole, the learned trial judge found that there was a 'dog fight' as between the first three appellants and the fourth appellant.

[55] In particular, the learned trial judge adverted to the following instances. The first being the evidence of the first appellant that at about 8.30pm on 30 August 2010 he was driven by the fourth appellant to Subang Jaya which was denied by the fourth appellant. The second instance was the evidence of the first three appellants that the first appellant was not at the farm on the night of 30 August 2010 and that he did not meet Sosilawati and company at the farm that night or any time thereafter, while the fourth appellant contradicted the evidence of the first three appellants by testifying that Sosilawati and company came to the farm on 30 August 2010 and did meet the first appellant and that both the second and the third appellants were also present. Finally, the evidence of the first three appellants that nothing untoward happened at the farm on 30 August 2010 was again contradicted by the fourth appellant who testified that on the night of 30 August 2010, Sosilawati's driver was beaten up and that the fourth appellant saw the three persons who came together with Sosilawati being laid on the logs and being burned.

[56] The learned trial judge noted the explanation of the defence on the diversity of the evidence namely that there was a fall out between the first appellant and the fourth appellant when the first appellant had rejected a request for help from the fourth appellant.

[57] His Lordship found that the testimony of the fourth appellant was crafted to portray his innocence where he had distanced himself from all the criminal activities which he said happened at the farm on the 30 August 2010 and 31 August 2010. Nevertheless, having considered that a portion of the evidence of the fourth appellant was consistent with the evidence of the prosecution, the learned trial judge chose to disbelieve the evidence of the first three appellants that nothing transpired at the farm on 30 August 2010 in relation to Sosilawati and company and accepted that part of the evidence of the fourth appellant which supported the prosecution case. The learned trial judge made an affirmative finding of fact that Sosilawati and company were at the farm on 30 August 2010 and that all the four appellants did meet Sosilawati and company at the farm that night.

[58] In re-evaluating the evidence of the family members, the learned trial judge found that the first appellant gave no explanation that the family members were mistaken or telling lies when testifying that Sosilawati and company were going to Banting to meet him.

[59] Considering that the defence led no evidence or produce their own records to counter the data contained in the TELCO records, the learned trial judge ruled that the evidence of the family members on the various calls made to Sosilawati and company stands.

[60] In respect of the evidence of SP33, the learned trial judge found that her evidence had not been dislodged by the evidence of SD26. A finding was made by the learned trial judge that SD26 was an 'undependable witness' and that she was evasive and had purposely refused to divulge any information incriminating the appellants. The learned trial judge chose to believe SP33 over SD26 as to what SP33 saw and heard on the night of 30 August 2010.

[61] As for the evidence of information leading to discovery, the learned trial judge found that the defence led no new evidence to enable him to reconsider his earlier ruling on s. 27 of the EA. The learned trial judge was satisfied that all allegations raised by the defence were sufficiently covered and answered during the trial-within-trial.

[62] The learned trial judge evaluated that part of the evidence of the fourth appellant which was not consistent with the prosecution case, namely when the fourth appellant said that on the night of 30 August 2010 more than four people apart from Sosilawati and company were present at the farm.

[63] The learned trial judge found it unbelievable that a total of nine to eleven people were present especially in the light of the subsequent evidence of the fourth appellant that these people together with Sosilawati and company were overpowered and confined to the neighbouring farm. His Lordship failed to see how the three farm hands could have overpowered such a large number of people.

[64] Given that the defence called no expert evidence of their own to counter the expert evidence of the doctors and chemist led by the prosecution, the learned trial judge found no reason to disregard the evidence of the prosecution relating to the finding of the human bones on the farm or the matching blood samples found on the zinc, cricket bat and on the wall.

[65] As for SD12, the learned trial judge did not accept his evidence that the logs recovered by the police on the information given by the second and fourth appellants were not suitable for open air burning. The learned trial judge stated that it would be an insult to the intelligence to rule that based on the evidence of SD12 no open air burning could have been carried out on the farm on 30 August 2010 as the finding of burnt logs, the charred remains of soil, the presence of fragmented burnt human bones and the burnt zinc pieces with blood spots could only mean that there was burning of bodies on the farm.

[66] The learned trial judge also found the evidence of SD12 that it would be impossible to burn one body on top of another to be his personal view, having noted that there is no evidence that SD12 had experimented with burning of a body on top of another. The learned trial judge found that such burning did take place as testified by the fourth appellant that he saw three bodies lying one on top of the other after which they were burnt.

[67] The learned trial judge had also made a finding on the motive of the first appellant to kill Sosilawati. This is how the learned trial judge puts it:

> In his evidence in court the 1st accused unwittingly spilled out a more cogent reason to commit murder. The 1st accused testified that for the same piece of land in Penang he was acting for both Sosilawati and Rahman Palil on 2 separate deals, both of which he had an interest in. He would stand to benefit more in the deal with Rahman Palil as the value of the land had skyrocketed.
>
> That was not the problem as the more serious problem was that Sosilawati might have had got wind of this double dealing and maybe even as to increase value of the land. According to the 1st accused he was reluctant to organise a meeting between Sosilawati and Rahman Palil.
>
> To me the reason for this was apparent as the 1st accused was caught between the devil and deep blue sea. On one hand was Sosilawati a well known entrepreneur and on the other hand in the words of the 1st accused a powerful politician. One of them had to be eliminated for the well being of the 1st accused and the person unfortunately was Sosilawati. The persons accompanying Sosilawati was merely at the wrong place at the wrong time.

[68] The submission of the defence that the prosecution had failed to stick to the facts mentioned in the opening statement when leading evidence in this case was considered by the learned trial judge. His Lordship found that the departure from the opening statement had not adversely affected the prosecution case and had not prejudiced the defence.

[69] In the final analysis, the learned trial judge found that the circumstantial evidence led by the prosecution was sufficient to prove its case beyond reasonable doubt. The appellants were thus convicted and sentenced to death.

[70] Aggrieved by the convictions and sentences, the appellants appealed to this court.

The Appeal

[71] Learned counsel for the respective appellant had put up an extensive written and oral submission. To avoid repetition, they had each submitted on specific issues and in so doing had adopted the submission of the other. We noted that essentially the complaint in this appeal was directed at the findings of the learned trial judge at the end of the prosecution case where it was submitted that the prosecution had failed to make out a *prima facie* case against the appellants; that the prosecution led no evidence, direct or circumstantial, that the four alleged victims named in the charges are dead or have been murdered, and if so, how, when, where, why and by whom.

[72] We do not wish to reproduce the submission of learned counsel for each of the appellant, except to state the gist of the submission as a whole on the following issues:

(i) exhibits P711 and 712;

(ii) section 27 information leading to discovery;

(iii) the TELCO records/the CDRs;

(iv) the DNA and forensic evidence;

(v) the credibility of SP33;

(vi) common intention;

(vii) other ancillary issues; and

(viii) evaluation of the defence.

[73] Before we consider the issues raised, we keep in mind the following golden principles of the standard of proof required for recording a conviction on the basis of circumstantial evidence as laid down in *Sharad Birdhichand Sarda v. State of Maharashtra* [1984] 4 SCC 116:

(i) the circumstances from which the conclusion of guilt is to be drawn must be fully established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave a reasonable ground for the conclusion consistent with the innocence of the accused and must show in all human probability the act must be done by the accused.

Exhibits P711 And 712

[74] As mentioned above, both SP29 and SP59 had turned hostile. The prosecution took the position that they should not be deprived of the valuable pieces of evidence, in particular the statement of facts admitted to in the Magistrates Court relating to what had happened to Sosilawati and company at the farm on 30 August 2010. Notwithstanding that the prosecution had, *vide* an affidavit, given an undertaking that the proceedings against SP29 and SP59 would not be used against the appellants in the murder trial, the prosecution applied to tender the records of proceedings in the Magistrates Court Teluk Datuk against SP29 and SP59 under ss. 11 and 34 of the EA. The records from the Magistrates Court, exhs. P711 and 712 were tendered through the Deputy Registrar, Norhayati binti Mohamad Yunus (SP105).

[75] The learned trial judge stated that the undertaking, even if given by the prosecution to the defence, does not bind the court. Although His Lordship found that exhs. P711 and 712 are not relevant to the murder trial, he allowed the application of the prosecution under ss. 11 and 35 of the EA as a basis to determine the credibility of SP29 and SP59. And further, although the learned trial judge found that the conviction of the appellants could not be premised on the exhibits, he found that P711 and 712 are corroborative of the fact that Sosilawati and company were burnt to death.

[76] It was the submission for the appellants that exhs. P711 and P712 do not fall within s. 35 and equally they do not fall within ss. 40 to 44 of the EA and were thus wrongly admitted into the trial and thereafter wrongly used either as substantive or corroborative evidence.

[77] The appellants had also raised the issue that having given an undertaking that the records of proceedings against SP29 and SP59 in the Magistrates Court will not be used in the murder trial against the appellants, learned DPPs had committed prosecutorial misconduct. And by the prosecution reneging on the undertaking, the appellants had been deprived of a fair trial procedurally and substantively. Learned DPP had submitted that the prosecution cannot be obstinately held to the undertaking if such undertaking would terminate its own case.

[78] It was further the submission for the appellants that the proper place to have raised or challenged the credibility of SP29 and SP59 *vis-a-vis* exhs. P711 and 712 would have been to have put the exhibits to SP29 and

A SP59 during the trial-within-trial, which was not done by the prosecution. On the authority of *Krishnan Marimuthu & Anor v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152; [1981] 2 MLJ 121, it was contended that material used in a trial-within-trial cannot form part of the main trial and cannot become substantive evidence against the appellants.

B **[79]** In a nutshell, it was the contention of the appellants that the prosecution was attempting to bolster an otherwise collapsed case with the introduction of the inadmissible evidence of SP29 and SP59.

Our Findings On Exhs. P711 And 712

C **[80]** We find merits in the complaints raised by the appellants. We are of the view that the question is not so much about the undertaking but the more pertinent question is whether the said exhibits could be properly admitted under the law although we must state that in our view it was unethical for the prosecution to renege on its undertaking.

D **[81]** As against the wishes of the prosecution to preserve its case, there lies the duty of the court to ensure that the prosecutor acts with the objective of proving its case in accordance with procedures and standards prescribed by the law (see *Ragg v. Magistrate's Court of Victoria and Corcoris* [2008] 2 VSC 1). To accept the assertion that the learned DPP may abandon what was E promised earlier on behalf of the Public Prosecutor would render the Public Prosecutor unaffected by any sense of conventional wisdom and conscience (see *Harun Abdullah v. PP* [2009] 4 CLJ 717) .

[82] Exhibits P711 and 712 are previous inconsistent statements of SP29 and SP59 and the law in this respect has been stated by the Federal Court F in *Krishnan Marimuthu* (*supra*), at p. 124 as follows:

> It must be remembered here that, lest we may be misunderstood, the proof of the inconsistent statement, whether under caution or not, under this procedure, does not constitute evidence of fact, but only evidence of inconsistency because of the contradiction of the evidence of the witness G with his former statement. In other words, the former statement is not replacing his evidence which has been contradicted, but only renders his evidence completely untrustworthy.

[83] We adopt the rule set out in *Hollington v. F Hewthorn & Co Ltd* [1943] 1 KB 587 that the evidence of a prior conviction would not have been H admissible in separate criminal proceedings to establish the truth of the underlying allegation as it was *res inter alios acta* (not the concern of others).

[84] The parties to the murder trial are different and did not in any manner or form, participate in the earlier proceedings in the Magistrates Court. We echo what has been said in *Hollington* (*supra*) at p. 602:

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> ... In many, perhaps in most cases, the correctness of the conviction would not be questioned, but where it is, its value can be assessed only by a re-trial on the same evidence. However, convenient the other course may

be, it is our opinion, safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal.

[85] We agree with the appellants that the proper place to challenge the credibility of SP29 and SP59 *vis-a-vis* exhs. P711 and 712 was to put the exhs. to SP29 and SP59 which the prosecution had failed to do.

[86] Further, although the prosecution had relied on ss. 11(b), 17 and 74 of the EA as the basis for the admission of P711 and 712, the learned trial judge had ruled that the record of proceedings from the Magistrates Court were admissible under s. 35 of the EA.

[87] Section 35 of the EA reads:

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

[88] Section 35 governs the admissibility of the non-judicial public documents (see *Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors* [1999] 7 CLJ 558; [2000] 1 MLJ 65) whereas the records from the Magistrates Court are judicial records which fall under s. 33 which provides:

33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable.

Provided that:

(a) the proceeding was between the same parties or their representatives in interest;

(b) the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) the question is issue were substantially the same in the first as in the second proceedings.

[89] Section 33 would have been applicable but for the fact that SP29 and SP59 were available and had testified in the trial. In the circumstances, we find that exhs. P711 and 712 were wrongly admitted into the trial. As such, they could not form the basis of conviction and neither could they be of any corroborative value. The learned trial judge had thus erred in finding that exhs. P711 and 712 were corroborative of the fact that Sosilawati and

company were burnt to death (see also *PP v. Leong Heo Cheong* [1990] 2 CLJ 818; [1990] 2 CLJ (Rep) 738; *PP v. Mohd Jamil Yahya & Anor* [1993] 1 LNS 95; [1993] 3 MLJ 702).

Information Leading To Discovery Under S. 27 Of The EA

[90] In the context of s. 27, SP32 was the most important witness for the prosecution. It was submitted that the learned judge had mishandled and had failed to undertake a maximum evaluation of the evidence of SP32. The failure of the learned trial judge to test the evidence of SP32 was contended to be a serious non-direction amounting to a misdirection. *Lim Pah Soon v. PP* [2013] 8 CLJ 800; *Tengku Mahmood v. PP* [1974] 1 LNS 176; [1974] 1 MLJ 110; *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1; [2007] 4 AMR 709; *Balachandran v. PP* [2005] 1 CLJ 85 and *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 were cited in support thereof.

[91] The evidence of SP32 may be summarised as follows.

(i) on 12 September 2010 at about 10am, Suresh, the third appellant and the fourth appellant brought SP32 and his men to the farm where SP32 recovered a 'penyeduk tanah', bone pieces, nine blood stains, six fingerprints, cut wires, cigarette butts, a cricket bat, soil sample, a container with liquid explosive and cut stained cushion (the first information);

(ii) on 12 September 2010 at about 3pm, SP32 'temubual' the fourth appellant and thereafter SP32 was brought by both the fourth and the second appellants to Sungai Panchau where with the help of forensic team and divers, SP32 found a knife, bone fragments, wires, keys, metal parts, a plastic bag with the words "Tapioca starch, super high grade, 50kg" printed on it (the second information);

(iii) on the same day at about 5.45pm, SP32 again 'temubual' the fourth appellant and from Sungai Panchau, SP32 was brought by the fourth and the second appellants to Kunci Air Pasar Besar, Banting where two Blackberry handphones (black and white) were recovered (the third information);

(iv) on 13 September 2010 at 3pm, SP32 'temubual' both the fourth appellant and Suresh at the IPD Kuala Langat. At about 3.30pm, SP32 'temubual' the second appellant and Suresh. SP32 was then brought by the second appellant, the fourth appellant and Suresh to Jambatan Kampung Endah where SP32 recovered a Seiko watch (the fourth information);

(v) at about 6.20pm on 13 September 2010 at Jambatan Sungai Kampung Endah, SP32 'temubual' both the second appellant and Suresh. SP32 was then brought to a rubbish dump at Sungai Arak where 14 pieces of burnt logs were discovered (the fifth information);

(vi) on 14 September 2010 at about 11am, SP32 was brought by both the fourth appellant and Suresh to Jambatan Sungai Kampong Endah where a watch (Bell & Ross) was discovered (the sixth information); and

(vii) on 14 September 2010 at about 5.05pm, SP32 'temubual' the second appellant and Suresh. SP32 was brought to Sungai Ladang, Kelapa Sawit, Jalan Kenangan where with the help of divers, SP32 found six pieces of zinc sheets (the seventh information).

[92] The credibility of SP32 was challenged by the appellants. The first appellant applied to impeach and the second appellant applied to contradict SP32 on the grounds that:

(i) there are inherent material contradictions in the alleged s. 27 information;

(ii) there are contradictions between the oral evidence of SP32 and his police reports (in particular Banting Report 7044/10 lodged on 12 September 2010; Tanjong Sepat Report 0947/10 lodged on 13 September 2010 and Banting Report 7070/10 lodged on 13 September 2010); and

(iii) there are material contradictions between the oral evidence of SP32 and the station diary (exh. D13A or P591) with regard to the movement of the suspects.

[93] The applications were dismissed by the learned trial judge for the following reasons:

(i) only first information reports (FIRs) are admissible. The reports lodged by SP32 are not FIRs, hence are inadmissible and cannot be used to contradict the witness; and

(ii) there are no material contradictions between the police reports and the oral evidence of SP32.

[94] The appellants contended that the findings of the learned trial judge were erroneous and that the rulings in respect of the appellants' application amounted to a breach of the appellants' right to a fair trial.

[95] The appellants had also raised the issue of police oppression and that the information or statements leading to the discoveries of the exhibits were jointly given by Suresh, the second appellant and the fourth appellants which do not fall within the scope of s. 27 of the EA.

Our Findings On Information Leading To Discovery Under S. 27

[96] On the issue of oppression, the learned trial judge had conducted a trial-within-trial after which His Lordship concluded that there was no oppression on the part of the police against the second and the fourth appellants.

[97] Section 27 of the EA is independent and not subject to the voluntariness rule in s. 24 (see *Francis Antonysamy v. PP* [2005] 2 CLJ 481; *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507). As such we are of the view that the issue of oppression is immaterial. What matters is whether the information given fulfils the requirement of s. 27.

[98] Before we consider whether the information given by the second to the fourth appellants is admissible under s. 27, we find merits in the submission of learned counsel that the learned trial judge had erred in his ruling that the police reports lodged by SP32 on the discoveries were inadmissible on the ground that they are not FIRs.

[99] The Federal Court in *Balachandran* (*supra*), had addressed the issue of admissibility of FIRs and non-FIRs as follows at pp. 95 to 96:

> ... The distinction between both types of reports is not anchored on rules relating to their admissibility but the purpose they serve.
>
> ...
>
> It must be added that only the first information report is admissible under s. 108A in addition to ss. 145 and 157 of the Evidence Act 1950 while the other reports are admissible only under the latter provisions of the law.

[100] For convenience, we reproduce below s. 145 of the EA:

> Cross-examination as to previous statements in writing
>
> 145. (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[101] As a matter of fact, s. 145 of the EA was relied upon by learned counsel for the appellants in making the application to impeach and to contradict SP32. On the authority of *Balachandran* (*supra*), we find that the learned trial judge had committed an appealable error in his ruling that the police reports lodged by SP32 were inadmissible.

[102] Be that as it may, we are of the view that the appellants had not been deprived of their rights to a fair trial as the appellants had every opportunity to cross-examine SP32. This brings us to the issue whether there are material contradictions between the oral evidence of SP32 and his police reports.

[103] Learned counsel had highlighted a number of contradictions but for purposes of this judgment, suffice if we state the following.

[104] In cross-examination by learned counsel for the first appellant, SP32 stated that with regard to the 3.45pm 'temubual' at Sungai Panchau on 12 September 2010, the fourth appellant, Suresh and the second appellant

were with him but only the fourth appellant provided the information. This was in conflict with his Banting Report 007044/10 where SP32 had stated that only the fourth and the second appellants were with him and that both the fourth and the second appellants provided the information at the same time.

[105] We find that the above discloses a material contradiction between the evidence of SP32 and his police report and that the finding of the learned trial judge that there is no material contradiction is, with respect, perverse.

[106] The evidence of SP32 also revealed different versions as regards who gave the information leading to the discovery of the incriminating items.

[107] The first information relates to the acts of pointing by fourth appellant, Suresh and the third appellant at the farm where certain items were then recovered. In the first version, SP32 clearly identified the fourth appellant, the third appellant and Suresh as the suspects who pointed. The second appellant was never identified. However, when SP32 was shown the photograph (exh. P4(24)), SP32 gave another version when he said "Kathavarayan (the fourth appellant), Thilai (the second appellant) and Suresh menunjukkan tempat kepada saya".

[108] The different version raises a doubt as to who actually gave the first information. Was it the fourth appellant, Suresh and the third appellant or was it the fourth appellant, Suresh and the second appellant? And who among them was the first to point which resulted in the discovery of the various items?

[109] As for the second information, SP32 said he was brought by the fourth and the second appellants to Sungai Pancau. The nature of the information was that the fourth appellant was alleged to have said "Abu mayat buang di Sungai Pancau. Tempat itu boleh tunjuk".

[110] The first version as regards the second information was that the information was given by the fourth appellant whereas when shown the photographs (exh. P5(1-5)), SP32 said "Gambar Kathavarayan (the fourth appellant) dan Suresh tunjukkan sebuah sungai, dekat Sungai Pancau, ke arah Sungai Pancau. ... Dia tunjukkan di sinilah buang abu mayat ... Kathavarayan (the fourth appellant) dan Thilai (the second appellant) yang tunjukkan kepada saya, Yang Arif". In the first version, there was no mention that the second appellant also 'tunjuk'. In fact, in the first version, SP32 made no mention of Suresh. In the second version, SP32 said both the fourth and the second appellants 'tunjuk'.

[111] In relation to the third information, it was the evidence of SP32 that he was brought by the fourth and the second appellants to Kunci Air Pasar Besar, Banting where the two Blackberry handphones were recovered. The first version given by SP32 was that the fourth appellant said "Kami buang telefon bimbit kepunyaan si mati ke dalam sebuah sungai dekat Kampung

A Endah" whereas the second version was "Saya buang di Kunci Air Pasar Besar Banting. Saya boleh tunjuk tempat". "Kami" in the first version connotes that there was someone else apart from the fourth appellant who had also given the information.

B **[112]** We noted from the record of appeal that the learned trial judge recognised that there are two versions given by SP32 (see AR vol. 9: p. 1669) and learned DPP had also remarked that SP32 kept changing his version (see AR vol. 9: p. 1678).

[113] The fourth information which relates to the discovery of the Seiko C watch had three versions. The first version was that the fourth appellant gave information relating to the victims' watches; the second version was information given by the fourth appellant relating to handphones whilst the third version was that the information relating to watches was given by Suresh.

D **[114]** The fifth information concerns the discovery of the 14 pieces of burnt logs at a rubbish dump at Sungai Arak. The first version was that the second appellant had given the information. The second version was that it was the second appellant and Suresh who had given the information.

[115] As for the sixth information, the first version relates to the discovery E of the Bell & Ross watch on the 14 September 2010 at Sungai Kampung Endah on the alleged information given by the fourth appellant and Suresh. The second version was on the discovery of the watch on 13 September 2010 where the fourth appellant was alleged to have said "kami buang tiga jam tangan mangsa di satu sungai berhampiran dengan Kampung Endah, kami F boleh tunjuk tempat itu".

[116] Finally, in respect of the seventh information which relates to the discovery of the zinc sheets, the first version was that the second appellant gave the information whilst the second version was that the second appellant and Suresh gave the information.

G **[117]** For s. 27 to apply, the discovery of a fact must be the consequence of the information given by the accused person (see *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171; [1989] 3 MLJ 356); the police must not have prior knowledge of the fact (see *PP v. Liew Sam Seong* [1981] 1 LNS 159; [1982] 1 MLJ 223) and the discovery should be the finding of H something which had been partially or wholly concealed and which might not have been found out, at least at that time, except as a consequence of the information given by the accused (see *MP State v. Dhannalal Moruji* [1961] 2 Cr LJ 238).

I **[118]** We have no doubt that in the instant appeal, the police had no prior knowledge of the locations where the personal items; items which had the DNA of Kamal, Kamil and Hisham and where the cars belonging to the victims were found. The items would not have been found if not for the information given by the second to the fourth appellant and Suresh.

[119] It is important to keep in mind that only the first information or statement that is admissible under s. 27 and not subsequent information or statement (see *Md Desa Hashim v. PP* [1995] 4 CLJ 677; [1995] 3 MLJ 350; *Krishna Rao Gurumurthi v. PP & Another Appeal* [2009] 2 CLJ 603; [2009] 3 MLJ 643). In the light of the above legal principle, our concern is whether the information leading to the various discoveries were given jointly by the second to the fourth appellants as well as Suresh, and who amongst them first gave the information.

[120] Several Indian authorities were cited in support of the submission for the appellants that information given by two or more accused persons jointly is unsafe and not admissible. In *Ramkishan Mithalal Sharma v. State of Bombay* 1955 AIR 104 the Supreme Court said at p. 116:

> The question that really arose for the consideration of the Court there was whether the joint statement attributed to the accused 1 and 2 in that case was admissible without specifying what statement was made by a particular accused which led to the discovery of the relevant fact and it was rightly held that a joint statement by more than one accused was not contemplated by section 27 and the evidence of Mistry, the police officer, in that behalf should therefore have been excluded.

[121] Having perused the appeal records, we find that the evidence of SP32 clearly show that the information given by Suresh and the second to the fourth appellants leading to the discoveries, were made jointly. We find favour in the submission for the appellants that s. 27 does not contemplate joint statement by one or more accused persons and that the information or statement given to SP32 ought to have been excluded by the learned trial judge.

[122] We nevertheless agree with the learned trial judge that the acts of the second to the fourth appellants in taking SP32 and pointing to the places where the items were recovered amount to conduct which is admissible under s. 8 of the EA. In *Prakash Chand v. State* 1979 AIR SC 400, Chinnappa Reddy J said at p. 404:

> The evidence of the circumstances, *simpliciter*, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act ...

[123] *Prakash Chand* (*supra*) had been cited with approval by our Federal Court in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149. We therefore accept the evidence of SP32 insofar as it relates to the fact that the second to the fourth appellants had displayed conduct consistent with their knowledge of the places where the items which were connected to the commission of the offence and which belonged to the victims were disposed off (see also *Syamo Malia Patro v. Emperor* AIR 1932 Mad 391; *Bala Anak Matik v. PP* [2006]

2 CLJ 229; [2006] 3 MLJ 516; *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109; [2009] 2 MLJ 367; *Mustapha Awang Besar v. PP* [2015] 1 LNS 52; [2015] 3 MLJ 347).

The Call Detail Records (The CDRs)

[124] The submission for the appellants was that the computer printouts for the telecommunication (TELCO) information or records are inadmissible. In respect of the CDRs and the itemised bill from Celcom, it was contended that the information which were extracted for the purpose of producing the CDRs were obtained from different computers which are located separately and not interconnected where the information had to be amalgamated manually by different people in order to produce the CDRs. As such, it was contended that the CDRs are not documents which were printed out by computer as defined under s. 3 of the EA and it follows that s. 90A cannot be resorted to by the prosecution to prove the information contained therein.

[125] It was further submitted that Norazlina binti Ahmad (SP40) through which exhs. P166 to P174 were tendered, was not the person responsible for the management of the operation of the computer or for the conduct of the activities for which the computer was used to print the said computer printouts.

[126] It was also submitted that even if the TELCO records are admissible, the evidence do not assist the prosecution case as there is a possibility that the information is inaccurate.

[127] The computer printouts from Maxis (exhs. P197 to P216) tendered through Ahmad Safuan bin Shaharani (SP46) and the computer printouts from Digi (exhs. P348A-P356) tendered through Mohamad Fesal bin Zakaria (SP55), was submitted to have suffered the same fate.

Our Findings On TELCO Records/CDRs

[128] We find that the forensic report (exhs. P464A & P464B) produced by ASP Mohd Zulkifly bin Mohd Isa (SP76) supported the oral evidence of SP9, SP14, SP15, SP33 and SP62. The forensic report contained SMSs between Kamil and Kamal and also between Hisham and his wife indicating that they were heading towards Banting (see P464A and P464B).

[129] Exhibit P464A revealed that on 30 August 2010 Kamil received numerous calls from number 016-2045518 at 6pm (see P464A p. 69 last transaction) and the number was saved in Kamil's contact list under the name of Dato Pathma 2. In our judgment, it would not be preposterous to state that Dato Pathma 2 refers to the first appellant.

[130] The evidence of SP15 with regards the call made by Kamil is supported by the CDR of Kamil (exh. P176 transaction number 95) which shows that at 6.53pm on 30 August 2010 there was a call from Kamil's number 019-2266222 to SP15's number, 012-7778017. Viewed with the

evidence of SP33 that she saw one woman and three men at about 7pm, it is reasonable to infer that when Kamil spoke to SP15, Sosilawati and company were at the stretch of the road leading towards the farm before they reached the farm as seen by SP33. The words "hutan" and "kelapa sawit" spoken by Kamil fit the description of the stretch heading towards the farm as can be seen from the photograph (exh. P9(4)). Therefore, the irresistible conclusion would be that when Kamil called SP15, Sosilawati and company were very close to the farm.

[131] We have no doubt from the evidence that Sosilawati and company had gone to Banting to see the first appellant and that the first appellant lied to SP24 when he told SP24 that he did not meet Sosilawati in Banting on 30 August 2010.

[132] The CDR of Sosilawati (exh. P175 at transaction 29-30) shows that at 17.59 and 18.01, there was a call transaction from number 019-2295153 belonging to Sosilawati to the number 012-20511243 which was registered under the legal firm of Pathma Nalli & Partners. The CDR of the first appellant's number 012-2045518 revealed a call transaction to Sosilawati at about 12pm on 30 August 2010. We agree with the learned trial judge that it is reasonable to infer that the call would be related to the meeting in Banting later that day.

[133] The learned trial judge had accepted that the TELCO information shows the location of Sosilawati and company. It was the submission for the appellants that the evidence of the TELCO information from Celcom, Digi and Maxis respectively, was inadmissible and inaccurate and that the learned trial judge erred in accepting the TELCO information.

[134] We agree with the findings of the learned trial judge that the witnesses from Celcom, Digi and Maxis respectively had full management and control of the computers generating the documents and had confirmed the accuracy of the data produced in the documents and records. We find no reason to disturb the findings of the learned trial judge and we find that each of the TELCO records from Celcom, Digi and Maxis respectively was correctly admitted notwithstanding some minor discrepancies in the telephone records of Kamil and the oral testimony of SP15 as to who had actually made the call. The fact remains that SP15 had spoken to Kamil on 30 August 2010 where Kamil had given the description of the place he was travelling as "hutan" and "kelapa sawit".

[135] The discrepancy between the oral evidence of SP15 that she was at Hartamas when she received the call from Kamil whereas the CDR shows that she was at Taman Tun Dr. Ismail, does not, in our view render the whole CDRs evidence unreliable. We find no evidence that the appellants had successfully discredited the information from the TELCO companies. We therefore find no reason to reject the evidence of CDRs as being not creditworthy (see *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617).

[136] Viewed together with the oral evidence of the family members of Sosilawati and company as to their intention to go to Banting and in the light of the evidence of SP15 and SP33, we accept the evidence from the CDRs as being corroborative of the fact that Sosilawati and company had indeed gone to Banting.

The DNA/Forensic Evidence

[137] The appellants contended that the CSI officers/the marine divers did not follow the search protocols in the alleged recovery of items and had no concern of cross-contamination of the exhibits which could have compromised the DNA findings. The appellants also canvassed the issue of the presence of the DNA of at least four unknown males found on the cricket bat (exh. P118B) and the cigarette butts (P122A and P123A) and the DNA evidence on the zinc sheets (exh. P80A, P78A and P75A).

[138] Apart from the arguments that the age of the bloodstains found on the wall could not be ascertained; that the sample had degraded and that there was no full profile of the DNA, submissions were made on the Malaysian Malay database and on the equipment used by the Chemistry Department. The evidence of SP86 was also challenged by the appellants as being hearsay and inadmissible.

[139] A point was raised as regards the knife that was recovered by the divers and thrown back into the river. Learned counsel contended that the knife thrown back was a far more potentially lethal weapon and the investigation in this matter and other related issues had seriously compromised the appellants' opportunity to show their innocence.

[140] The other point raised was on the woods/logs recovered from a dump site which were produced in court by the investigating officer, ASP Mohd Ishak bin Yaakob (SP99), implying that these logs had been used in the fire at the farm and thereafter dumped. Learned counsel highlighted that these logs neither had any DNA on them nor the presence of accelerants, thereby belying the prosecution theory of their alleged use.

[141] SP99 had sent 58 soil samples and zinc samples from the farm to Sivabalan, the government chemist. Sivabalan was not called by the prosecution to testify with regard to the analysis that he had carried out on the zinc samples or the soil samples. Sivabalan was however called by the defence and it was the evidence of Sivabalan (SD20) that no accelerants were detected in the soil. SD20 had also testified that there was no presence of hydrocarbon on the exhibits recovered namely the soil samples, the zinc, the metal pieces and the burnt woods. It was thus contended by the appellants that the evidence of SD20 had negated the presence of accelerants in the soil sample taken from the farm.

[142] As for the bones recovered, the appellants contended that the evidence of SP63 and SP80 did not prove that the bones were human bones.

Our Findings On The DNA/Forensic Evidence

[143] The Director of the Forensic Division Department and also the Head of Forensic DNA Serology Section, Chemistry Department, Lim Kong Boon (SP86) had analysed the blood/tissue sample from the cricket bat and swabs from the wall of a premise in the farm. SP86 found that the cricket bat had the DNA of Hisham and that the DNA on the Swab 9 from the wall matched that of immediate family members of Hisham. The zinc sheets were also analysed where the result revealed that three zinc sheets exhs. P80A, P78A and P75A had the DNA of Kamal and Kamil. The complaint of the appellants was that the evidence of SP86 was hearsay as his assistants or lab assistants did the 'ground work' for him.

[144] SP86 had specifically testified that the officers who had assisted him in this case were under his close supervision and under his strict instructions. SP86 gave oral evidence as regards his analysis and he tendered his report exh. P600. It is an established principle of law that the chemist is not required to go into details of what he did in the laboratory step by step. So long as the chemist is able to give credible evidence to support his opinion, the court is entitled to accept such opinion unless there is in rebuttal an opinion of another expert (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 3 MLJ 492). In the instant case, there is no rebuttal expert evidence. We therefore disagree with the appellants that the evidence of SP86 is hearsay and inadmissible. In our view, the fact that the chemist is assisted by other officers does not *ipso facto* render the evidence of the chemist hearsay. And we find no reason to depart from the findings of the learned trial judge who had accepted the evidence of SP86.

[145] As to the presence of unknown male DNAs on the cricket bat and the cigarette butts as well as fingerprints, we take note that the farm is on open place and there are other occupants residing at the farm. The existence of unknown male DNAs on the cricket bat and the cigarette butts is immaterial. It does not negate the fact that the DNA of Hisham was on the cricket bat which shows that Hisham was at the farm and the presence of blood irresistibly points to the fact that the bat was used on Hisham. Similarly the DNA of Kamal and Kamil found on the zinc sheets which were recovered as a result of the second appellant and Suresh showing the place of recovery to the police provided the link or nexus between Kamal and Kamil to the appellants. This evidence shows that at least these three victims were at the farm.

[146] As for the contention that there was cross-contamination of the exhibits, we find no evidence that the integrity of the exhibits had in fact been compromised such that the results of the analysis by the chemist and/or the medical officers are vitiated.

[147] Swab 9 was the bloodstain which was found to be the bloodstain of Hisham based on his DNA testing. The complaint of the appellants was that Swab 9, as admitted by SP86, came from a partial at 13 loci as opposed to

A a full profile of 15 loci. Regardless, the fact remains that SP86 was able to obtain a profile from it where SP86 had testified that Swab 9 (exh. P226A) came from a single source profile. In his report (exh. P600), SP86 had concluded that Swab 9 came from Hisham. We see no reason to disregard the finding of SP86 that the DNA of Hisham was found on Swab 9.

B **[148]** A challenge was also made by the appellants in respect of the equipment at the Chemistry Department. SP86 had explained why the equipment was set at RFU reading of 50 instead of 150 as contended by the appellants. There is no basis for us to reject the explanation of SP86. We therefore dismissed the argument of the appellants on the calibration of the C equipment as being devoid of merit.

[149] SP63 who specialises in forensic anthropology did an analysis on the bones found at the farm and from Sungai Pancau. SP63 concluded that the bones were probably human bones. She also found that the bones showed extreme heat-induced colour changes and bone alterations related to exposure to D extreme heat. Two (2) other experts namely forensic odontologist Norhayati binti Jaafar (SP69) and radiologist Zaleha binti Abdul Manaf (SP71) similarly stated that the bone fragments were probably human bones.

[150] For the reason that the bones were too charred and burnt, SP71 and E forensic anthropology expert, Faridah binti Mohd Nor (SP80) could not make positive findings of the bones. Likewise SP86 could not conduct any DNA extraction or analysis on the bones as they had been subjected to extreme heat and had lost all traces of DNA.

[151] It was submitted for the appellants that the possibility of the bones F being animal bones had not been conclusively excluded by SP63 and SP80. As such, their evidence had rebutted the prosecution case.

[152] It is pertinent to note that SP63 had identified the bones found on the farm and Sungai Pancau as "berkemungkinan besar" human bones and from the testimony of SP63 and SP80, the human bones were subject to extreme G heat which was consistent with the prosecution case.

[153] Notwithstanding the lack of positive findings of the bones recovered from the farm and the river and the lack of proof on accelerants, we are satisfied, from the evidence of SP33 and from the presence of the DNA of Hisham found on the cricket bat and the bloodstain on the wall and the DNA H of Kamal and Kamil on the zinc sheets, that all three of them had been burnt on the farm. The photographs in fact show the combustion site and traces of burning on the farm (see exh. P10(62-79)).

[154] In our view, the lack of hydrocarbon does not detract from the fact I that SP33 had seen a big fire on the night of 30 August 2010. The photograph (exh. P3(88)) shows the effect of burning on the leaves of the adjoining palm oil trees. Taken together with the conduct of the second and the fourth appellants in pointing to the police the river where the ashes were thrown, we are of the view that the evidence of SD20 did not rebut the prosecution case.

[155] We are also mindful of the fact that Sungai Panchau is close to the site for the Hindu ritual casting of ashes and remains into the sea. Again, given the conduct of the appellants in pointing the river to the police, we conclude that the proximity of Sungai Pancau to the Hindu ritual site does not negate the prosecution case.

[156] On the Malay population database, SP86's explanation on why he had taken a sample of 246 individual Malays was that according to forensic scientific community and SWEDAM (Scientific Working Group on DNA Analysis Method), a population database size of around 100 is sufficient for the purpose of evaluating forensic DNA evidence. Again, we find no reason to reject his explanation. The sample of 246 is thus more than sufficient for the evaluation of forensic DNA evidence.

The Evidence Of SP33

[157] The appellants contended that the evidence of SP33 was highly suspect for the following reasons:

(i) she admitted that she will lie if necessary;

(ii) she admitted that she had lied about her age in order to gain admission into this country;

(iii) her evidence appears to be incredible and have been rehearsed or coached or scripted;

(iv) the manner in which she answered the question posed by the prosecution and defence shows that she was trained to answer the question;

(v) she admitted that she had flouted Malaysian Immigration laws, yet she is not prosecuted;

(vi) she is an interested witness in the sense that she has something to gain by co-operating with the police;

(vii) she had an axe to grind against the first and the fourth appellants as she claimed that she had been mistreated by them;

(viii) her evidence about the fire and the logs were not supported by forensic evidence;

(ix) her evidence contradicted the evidence of another occupant on the farm, Vakasan a/l Richard (SP89); and

(x) her evidence repeatedly mentioned Jacintha, the wife of the fourth appellant, who was not called by the prosecution to corroborate her version.

[158] It was submitted that the learned trial judge had failed to take into consideration the above factors in his appreciation and evaluation of SP33. In essence, the appellants contended that the evidence of SP33 who is under a witness protection programme was almost doctored to meet the needs of the police guardians.

Our Findings On SP33

[159] We find no merits in the above submission. The learned trial judge had directed his mind to the challenge made by the appellants on the credibility of SP33 wherein His Lordship found as follows:

> The clearest indication that this witness was a credible and truthful witness was when she honestly answered that she said she saw 3 men and 1 woman entering the farm on the evening of 30/8/2010 but could not recognise them and was not able to confirm when the photographs of Sosilawati and company was shown to her that these were the persons who had come to the farm. If she had been coached by the prosecution or had leaned in bias towards the prosecution she could have positively identified Sosilawati and company which would cut out the work for the prosecution.

[160] SP89 did not escape the learned judge's mind when he was found to be a witness of no consequence as he took the attitude of the proverbial monkey of seeing no evil, hearing no evil, and speaking no evil. His testimony indicated that even if any incident had taken place at the farm on 30 August 2010, he would not have known as he had slept right until the morning. This witness, observed the learned trial judge, was not a wholly truthful witness who sought not to cooperate or volunteer any information and taking the cautious attitude of being neutral.

[161] The principle in respect of credibility of witnesses is trite, namely that it is within the domain of a trial judge and unless there are compelling reasons for an appellate intervention, an appellate court would defer to the findings of the trial judge who had the audio visual advantage in assessing the witness (see *Andy Bagindah v. PP* [2000] 3 CLJ 289; [2000] 3 MLJ 644; *Wan Marzuki Wan Abdullah v. PP* [2008] 4 CLJ 631).

[162] In the instant appeal, the learned trial judge had given his reasons why he chose to believe SP33 over SP89 and SD26. There is no basis for us to disturb the said findings. The fact that SP33 is under the witness protection programme is not a reason to reject her evidence, which is supported in material particulars by the CDRs, the DNA evidence and the evidence of the fourth appellant.

Common Intention

[163] It was submitted for the appellants that the evidence which the prosecution could rely upon in order to prove common intention would be the evidence of SP33 and the TELCO evidence. However, the evidence of SP33 failed to prove any of the elements of common intention. And the

CDRs did not show any common intention as there is no evidence of proximity among the appellants on 30 August 2010 during the time stated in the charge.

[164] In particular, in respect of the third appellant, submission was advanced that there was no evidence that the third appellant had been in discussion with the other appellants at any material time and that the evidence of SP33 about seeing the second and the third appellants unloading the logs on 29 August 2010 is not unusual as the third appellant and the others were workers at the farm.

Our Findings On Common Intention

[165] It is settled law that common intention may be inferred from the facts and surrounding circumstances of the case (see *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336; *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; [2015] 1 MLJ 617). The prosecution submitted that the participation of each of the appellant in the commission of the crime can be seen from their conduct during the discovery of the incriminating items recovered at the various locations.

[166] The learned trial judge found that from the evidence, Sosilawati had business transaction with the first appellant who acted as her solicitor and that Sosilawati and company came to the farm in two cars. The cars were later found at separate locations upon being shown by SP59. The learned trial judge found that the only person who had dealings with Sosilawati was the first appellant and that if there was any grudge, it must be borne by the first appellant and that the second to the fourth appellants were his lackeys executing his instructions.

[167] We accept that there is no evidence of discussion between the appellants. The evidence that we can rely on as regards the participation of all the appellants is from the evidence of SP33 who testified as to the presence of the appellants on the farm at the material time and from the conduct of the second to the fourth appellants. It is a clear principle of law that for the participation requirement, even a passive role in the commission of the act is enough (see *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688). It is in the evidence of the fourth appellant that the second and the third appellants arranged the bodies of Kamal, Hisham and Kamil on the logs and subsequently burnt them.

Other Ancillary Issues

[168] Apart from the issue of undertaking and/or prosecutorial misconduct which we had addressed above under exhs. P711 and 712, the other issues raised by the appellants which may be categorised as procedural unfairness relate to the striking out of the subpoenas against the DPPs and the departure by the prosecution from its opening address.

[169] On the issue of subpoenas, the DPPs who conducted the proceedings against SP29 and SP59 in the Magistrates Court were the same DPPs conducting the murder trial. In the light of the allegations by SP29 and SP59 that they were coerced into pleading guilty in the Magistrates Court, the appellants contended that there was complicity between the police, the lawyers and the prosecutors in the proceedings against SP29 and SP59, hence the issuance of the subpoenas against the DPPs which were struck out by the learned trial judge.

[170] As for the departure from its opening statement, the appellants contended that the course taken by the prosecution had caused prejudice to the appellants.

[171] For the fourth appellant in particular, a complaint was raised as regards the manner the learned trial judge dealt with his new assigned counsel. The learned trial judge had given the new counsel less than ten days to get ready for the trial. It was contended for the fourth appellant that it was humanly impossible for the new counsel to get ready in less than ten days at the stage where more than 90 witnesses had given evidence involving 10,000 pages of notes of proceedings. Another complaint of the fourth appellant relates to the directive given by the learned trial judge that the fourth appellant be isolated from the rest of the appellants and their defence counsel.

Our Findings (Procedural Unfairness, Complicity Between The Police, Lawyers And The Prosecutors; Subpoenas Against The Prosecutors)

[172] The proceedings against SP29 and SP59 in the Magistrates Court Teluk Datuk had gone through the judicial process. There is no proof of any complicity as suspected by the defence. We find no impropriety in the proceedings and we agree with the learned trial judge that the application to call the prosecutors as witnesses was not relevant for the following reasons:

(i) if the purpose of calling the three DPPs was to prove any irregularity of the proceedings concerning SP29 and SP59, then such evidence would be more relevant in those proceedings, not in the murder trial;

(ii) if the purpose of calling the three DPPs was to prove that force was used on SP29 and SP59 to elicit guilty pleas from them, then the evidence of the three DPPs would be of little assistance because the sole determinant whether a person had pleaded guilty voluntarily is the Magistrate;

(iii) the record of the Magistrate showed that he had noted on a number of occasions that SP29 and SP59 had pleaded guilty voluntarily;

(iv) there were no circumstances shown under which the three DPPs could assist the court and calling them as witnesses will only serve to put them in the 'spotlight' and will divert the murder trial; and

(v) the testimony of the three DPPs in relation to the Magistrates Court proceedings against SP29 and SP59 is irrelevant and would not alter the record of proceedings in the Magistrates Court.

[173] We also agree with the learned trial judge that while it is a procedural requirement for the prosecution to tender an opening statement as stipulated under s. 179(1) of the CPC, a conviction may be founded on a basis not indicated by the prosecution in its opening address (see *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197). We further agree with the learned trial judge that the departure from the opening statement did not adversely affect the prosecution case. Richard Malanjum CJ (Sabah & Sarawak) stated the following in *Wan Marzuki Wan Abdullah v. PP* [2013] 1 CLJ 177:

> The contents of the opening statement of the learned deputy should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. We would further say that an opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice.

[174] In respect of the fourth appellant's specific complaint against the learned trial judge, we find the complaint to be devoid of any merits. The learned trial judge had enquired from the new counsel whether he was ready to proceed and learned counsel had answered in the affirmative. As for the directive that the fourth appellant be isolated from the rest, we gather from the appeal record that the fourth appellant had lodged a police report that he had been threatened. More importantly, we have not been shown how the trial judge's ruling had prejudiced the fourth appellant in putting up his defence.

Evaluation Of The Defence

[175] The first appellant served a notice of alibi pursuant to s. 402A of the CPC. In putting forward the defence of alibi, the burden on the first appellant is to adduce credible evidence to cast a reasonable doubt that he was at the scene of the crime as contended by the prosecution (see *Azilah Hadri* (*supra*); *Illian & Anor v. PP* [1988] 1 LNS 139; [1988] 1 MLJ 421; *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301; s. 103 of the EA (illustration (b)).

[176] ACP Mohamad Jamil bin Mohamad Hassan (SP61) stated in his evidence that on 30 August 2010 at about 1.30pm, the first appellant had called him to invite him for break fast. However, according to SP61, after 7pm, the first appellant did not call him to confirm the plan. SP61 then called the first appellant and SP61's testimony is as follows (RR27:5361-5362):

> Telefon nombor yang saya sebutkan tadi itu dan dapat jawapan daripada beliau dan beliau bagi tahu kepada saya, dia semalangnya dia tidak dapat hadir kerana dia dikehendaki menyelesai urusan-urusan yang belum diselesaikan lagi. Tetapi dia juga bagitahu kepada saya, dia datang juga jumpa saya malam itu dan dia suruh saya tunggukan dia. Jam belum dia tetapkan lagi.

[177] It was the argument of the prosecution that the appointment for the break fast was deliberately planned by the first appellant with the view to set up his defence of alibi.

[178] To establish alibi, the first appellant must disclose where he was at the time of the alleged offence and what he was doing (see *Vasan Singh v. PP* [1989] 2 CLJ 402; [1989] 1 CLJ (Rep) 166). The time as preferred in the charge was between 8.30pm to 9.45pm on 30 August 2010. The first appellant arrived at Dorsett Hotel, Subang to meet SP61 at about 10.15pm to 10.20pm. We find that the evidence of SP61 is not evidence in support of alibi. The first appellant could be travelling at the time stated in the charge in which case the evidence of his brother who had purportedly driven him to Subang would be material but the brother was not called to testify.

[179] Further, the evidence of the first appellant in his defence contradicts the evidence given by SP61. According to SP61, the first appellant told him that the first appellant was sent to Dorsett Hotel by his brother. In his defence, the first appellant stated that it was the fourth appellant who had driven him to Dorsett Hotel, which version was denied by the fourth appellant. In the circumstances, we find that the first appellant's defence of alibi had failed to raise a reasonable doubt on the prosecution case.

[180] The defence of the first, second and the third appellants was one of a complete denial. The defence of the fourth appellant, on the other hand, implicated the first three appellants. From the evidence of the fourth appellant, which was in material contradiction with the evidence of the first to the third appellants, it is apparent that there was a 'dog fight' between the first to the third appellants and the fourth appellant.

[181] In *PP v. Lim Teik Seng & Ors* [1985] 2 CLJ 61; [1985] CLJ (Rep) 691 the learned judge said at p. 700:

> In passing I would pause to remark, that as often happens when there is a dog fight between the defendants in a criminal trial - and by this I mean where one defendant in the course of his evidence put forward a defence which constitutes an attack upon his co-defendant, as happened in this case, so far as the second and third accused persons were concerned - the result are usually disastrous for both.

[182] Indeed, in the present instance, we similarly find that the result of the attack by the fourth appellant on the three other appellants is disastrous to all of them. The fourth appellant had narrated in his evidence the involvement of each one of them in the commission of the murder. A substantial portion of the evidence of the fourth appellant supported the prosecution case.

[183] In particular, the fourth appellant testified that:

(i) the first, the second and the third appellants were present at the farm on 30 August 2010;

(ii) Sosilawati and company were also at the farm on 30 August 2010;

(iii) he heard screams and sound like there was a fight in the karaoke room;

(iv) the first appellant had instructed him to inform the rest of the people at the house not to come out;

(v) Sosilawati and company were murdered at the farm on 31 August 2010;

(vi) the instruction to kill was given by the first appellant;

(vii) the preparation to kill and burn the bodies were done on 29 August 2010;

(viii) the second and the third appellant had laid the logs and burnt the three men;

(ix) the first appellant told the second to the fourth appellants that they can co-operate with the police and give statement; and

(x) later the second to the fourth appellants can claim that they had been forced by the police to make the statement.

[184] The learned trial judge accepted the evidence of the fourth appellant which was consistent with the prosecution case and rejected that part of his evidence which contradicts the prosecution case. The learned trial judge is entitled to take that approach (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19).

Conclusion

[185] It is our judgment that at the end of the prosecution case, the learned trial judge had correctly called for the defence. From the direct evidence of family members, friends and SP33, taken together with the circumstantial evidence in the form of the CDRs, the forensic and the DNA evidence which established the presence of Sosilawati and company at the farm, it could be safely inferred that Sosilawati and company had met their deaths at the farm. The knowledge that the second, third and the fourth appellants had of the places where the incriminating items were found and their conduct in showing those places to the police is a definite pointer towards the guilt of the appellants.

[186] The phone calls from Kamil and Hisham that Sosilawati had problem with her driver, Kamal and that they would be going to Genting Highlands for three days was a version that is difficult to believe, incredible and improbable. It was the holy month of Ramadhan and it was highly unlikely that they would at the spur of the moment, decide to go to Genting Highlands. And why Genting Highlands to sort out the alleged problem that Sosilawati had with Kamal? In our view, it is more probable that they were forced to make the calls to deviate the attention from the first appellant and Banting.

[187] At the conclusion of the trial, we are satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. The evidence of the fourth appellant corroborated SP33 in material particulars. In fact, the evidence of the fourth appellant had strengthened the prosecution case. We do not lose sight of the fact that the DNA of Sosilawati was not found on either the cricket bat, the swabs of bloodstains on the wall or on the zinc sheets.

[188] Notwithstanding the above, we are of the view that the inferences to be drawn from the facts and circumstance of this case unerringly lead to the conclusion that within all human probability, Sosilawati is dead and that the appellants were the perpetrators leading to her death as well as the death of Kamal, Hisham and Kamil. The principles set out in *Sharad Birdhichand Sarda* (*supra*), in our view, had been met by the prosecution.

[189] Taking the evidence cumulatively, we find that the convictions of the appellants are safe. We therefore unanimously dismiss the appeals and we affirm the convictions and sentences of the appellants.